No.

Supreme Court, U.S.
FILED
MAY 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LORD ELECTRIC COMPANY, INC.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JAY TOPKIS
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10154
(212) 644-8000
(Counsel of Record)

JEFFREY C. SLADE
BRENDA WRIGHT
MEISTER LEVENTHAL & SLADE
777 Third Avenue
New York, New York 10017
(212) 935-0800

WILSON M. BROWN, III
DRINKER BIDDLE & REATH
1100 Philadelphia National Bank Building
Broad and Chestnut Streets
Philadelphia, Pennsylvania 19107
(215) 988-2700

Counsel for Petitioner
Lord Electric Company, Inc.

Questions Presented

1. Whether the Court of Appeals erred in holding that a continuous course of bid-rigging pursuant to a single agreement may be divided into multiple antitrust prosecutions by an unprecedented inquiry into the "relevant market" in which each bid was rigged?

2. Whether the Court of Appeals erred in reversing the District Court's dismissal of the indictment on double jeopardy grounds by focusing solely on bidding conditions at particular projects rather than employing the "totality of the circumstances" test used in other circuits to determine whether all bid-rigging was pursuant to a single conspiracy?

3. Whether, on a nonfrivolous double jeopardy claim, the government must bear the burden of proving that the second indictment charges a separate conspiracy, and if so, whether the Court of Appeals erred in holding for the government on a finding that the defendants had failed to present "unambiguous evidence" of a single conspiracy?

4. Whether a court of appeals considering a dismissal on double jeopardy grounds is required to defer to the trial court's factual findings and its resolution of competing inferences unless such findings are clearly erroneous, and, if so, whether the Court of Appeals erred in reversing because it viewed the evidence as ambiguous or capable of supporting different inferences?

5. Whether the Court of Appeals' decision is in conflict with decisions in other Circuits, including *United States v. Beachner Construction Co., Inc.*, 729 F.2d 1278 (10th Cir. 1984); *United States v. Portsmouth Paving Corp.*, 694 F.2d 312 (4th Cir. 1982); and *United States v. David E. Thompson, Inc.*, 621 F.2d 1147 (1st Cir. 1980)?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provision and Statute Involved	2
Statement of the Case	3
I. Western Pennsylvania Conviction	3
II. Eastern Pennsylvania Indictment	4
A. Proceedings in the District Court	4
B. The Court of Appeals' Decisions	6
1. Judge Gibbons' Opinion	6
2. Judge Stapleton's Concurrence	7
3. Judge Adams' Dissent	7
Reasons for Granting the Writ	9
I. The Court of Appeals' "Relevant Market" Analysis, and Its Creation of Legal Presumptions Based on Speculative Economic Theories, Rewrite the Law on Conspiracies under Section 1 of the Sherman Act	9
A. The Decision Below Is in Conflict with Decisions of This Court	9
B. The Decision Below Is In Conflict with Decisions of Other Circuits	11

PAGE

II. The Narrow "Relevant Market" Test Employed by the Court of Appeals Is in Conflict with the "Totality of the Circumstances" Test Used by Other Circuits to Determine Whether Successive Conspiracy Prosecutions Violate the Double Jeopardy Clause. 12

III. This Court Should Grant the Writ to Determine a Defendant's Procedural Rights on a Pre-trial Claim of Double Jeopardy. 14

A. Burden of Proof 14

B. Standard of Review 15

Conclusion 17

TABLE OF AUTHORITIES

Cases: PAGE

Abney v. United States, 431 U.S. 651 (1977) 14

Albrecht v. Herald Co., 390 U.S. 145 (1968) 10

Anderson v. City of Bessemer City, ____ U.S. ____, 105 S.Ct. 1054 (1985) 8, 16

Blockburger v. United States, 284 U.S. 299 (1932) 12

Braverman v. United States, 317 U.S. 49 (1942) 11

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 14

National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984) .. 9

United States v. Beachner Const. Co., Inc., 729 F.2d 1278 (10th Cir. 1984) 11, 13, 15

United States v. Bendis, 681 F.2d 561 (9th Cir. 1981) *cert. denied*, 459 U.S. 973 (1982) 13, 15

United States v. Booth, 673 F.2d 27 (1st Cir.), *cert. denied*, 456 U.S. 978 (1982) 13, 15

United States v. Castro, 629 F.2d 456 (7th Cir. 1980) ...13, 15

United States v. Consolidated Packaging Corp., 575 F.2d 117 (7th Cir. 1978) 11, 12

United States v. David E. Thompson, Inc., 621 F.2d 1147 (1st Cir. 1980).....11, 12

United States v. Felton, 753 F.2d 276 (3d Cir. 1985).... 13

United States v. Fischbach & Moore, Inc., 750 F.2d 1183 (3d Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1397 (1985)..... 4, 14

United States v. Inmon, 568 F.2d 326 (3d Cir. 1977) ... 15

PAGE

United States v. Lurz, 666 F.2d 69 (4th Cir. 1981), *cert. denied*, 459 U.S. 843 (1982) 13

United States v. Mallah, 503 F.2d 971 (2d Cir. 1974) *cert. denied*, 420 U.S. 995 (1975) 13, 15

United States v. Marable, 578 F.2d 151 (5th Cir. 1978) . 13

United States v. Martinez, 562 F.2d 633 (10th Cir. 1977) 15

United States v. Portsmouth Paving Corp., 694 F.2d 312 (4th Cir. 1982) 11, 12

United States v. Sinito, 723 F.2d 1250 (6th Cir. 1983) *cert. denied*, ____ U.S. ____, 105 S.Ct. 86 (1984) 13, 15

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 8, 10, 14

United States v. Stricklin 591 F. 2d 1112 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979) 15

United States v. Sturman, 679 F.2d 840 (11th Cir. 1982) *cert. denied*, 459 U.S. 1171 (1983) 13

United States v. Thomas, 759 F.2d 659 (8th Cir. 1985).. 13

United States v. W.V. Pangborne & Co., Inc., Cr. No. 84-105 (E.D. Pa.) 3

Constitution and Statutes:

United States Constitution, amend. V..... 2

15 U.S.C. § 1 (Sherman Act) 2, 3, 6, 8, 9, 10

18 U.S.C. § 3731 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

Other Authorities:

Federal Criminal Jury Instructions of the Seventh Circuit (1980) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. ____

LORD ELECTRIC COMPANY, INC.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Lord Electric Company, Inc. ("Lord Electric")[1] asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on March 14, 1986.

Opinions Below

The opinion announcing the judgment of the Court of Appeals (Gibbons, J.), together with the concurring and dis-

1 Pursuant to Rule 28.1 of the Rules of this Court, Lord Electric represents that it has the following parent company and affiliates: LECO Enterprises, Inc., Lord International, Inc., Lord Corporation of Puerto Rico, Inc., Lord Electric Company of Puerto Rico, Inc., Halfhill Electrical Company, Ltd., Helmont Construction Company, Inc. and J.L. Murphy, Inc.

senting opinions (Stapleton, J. and Adams J., respectively), are reported at 785 F.2d 1123, and at pages 1a-35a of the Appendix to the Petition for a Writ of Certiorari of W.V. Pangborne and Co., Inc. ("Pangborne") and J.A. Bruce Pinney.[2] The order denying Petitioner's application for rehearing in banc by a 6-5 vote of the active Circuit Judges appears at page 60a of the Pangborne Appendix. The opinion of the United States District Court for the Eastern District of Pennsylvania, not officially reported, appears at pages 36a-55a of the Pangborne Appendix.

Jurisdiction

The judgment of the Court of Appeals reversing the District Court was entered on March 14, 1986. A timely petition for rehearing in banc was denied on April 18, 1986. Petitioner's timely motion for stay of the mandate pending determination of this Petition was granted on May 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C.§ 1291 and 18 U.S.C. § 3731.

Constitutional Provision and Statute Involved

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or com-

---

2 In addition to Pangborne and Pinney, Sargent Electric Company has also filed a petition for a writ of certiorari from the decision of the Third Circuit.

merce among the several States, or with foreign nations, is declared to be illegal."

Statement of the Case

An indictment charging Petitioner with an antitrust conspiracy under Section 1 of the Sherman Act was dismissed by the District Court, following a full evidentiary hearing, on grounds that the prosecution would violate the Double Jeopardy Clause. In reversing, the panel majority (Adams, J., dissenting) created new rules for determining the scope of a per se unlawful antitrust conspiracy, rules which are irreconcilable with this Court's precedents, decisions of other Circuits, and Petitioner's rights under the Double Jeopardy Clause of the Constitution. Petitioner respectfully requests that the writ be granted to review the important questions raised by the Court of Appeals' decision.

I. Western Pennsylvania Conviction

Lord Electric was first indicted in July 1983 for violating Section 1 of the Sherman Act by conspiring to rig bids for electrical construction projects at the Western Pennsylvania Works of United States Steel ("USS") from the mid-1970's through 1981. Indicted with Lord Electric were Sargent Electric Company ("Sargent Electric") and Fischbach and Moore, Inc. ("Fischbach & Moore"). The indictment charged a single conspiracy to rig USS bids even though USS selected the companies that could bid on each project and even though bidders lists changed frequently throughout the period.

The jury found Lord Electric, Sargent Electric and Fischbach and Moore guilty as charged, and each was sentenced to the maximum penalty possible for an antitrust conspiracy, a fine of $1,000,000 plus the costs of prosecution. On appeal, the Court of Appeals for the Third Circuit held that the government had proven a single conspiracy as to all jobs, despite evidence of differences in the bidders lists for different pro-

jects. *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183 (3d Cir. 1984). This Court denied all petition for writs of certiorari. ____ U.S. ____, 105 S.Ct. 1397 (1985).

II. Eastern Pennsylvania Indictment

In July 1984, four months after Lord Electric was sentenced, the company was again indicted under the Sherman Act for a conspiracy to rig bids on USS projects in Pennsylvania along with Sargent Electric and a Fischbach & Moore subsidiary, Pangborne. The "Offense Charged" was virtually identical to the previous indictment, changing only the name of the USS facility involved (the "Fairless Works" in Eastern Pennsylvania) and the place of the specific conspiratorial meetings on that facility (the Philadelphia Airport Motel "and other places").

A. *Proceedings in the District Court*

All defendants moved immediately to dismiss the Fairless Works indictment on the ground that the government had artificially divided a single antitrust conspiracy into separate prosecutions, in violation of the Double Jeopardy Clause.[3] The District Court held that the defendants' moving papers made a prima facie showing that the Fairless Works indictment placed them twice in jeopardy for the same offense. The government did not challenge this ruling on appeal. The Court accordingly ordered an evidentiary hearing.

After the hearing, the District Court found that the evidence was wholly inadequate to sustain the government's burden of proving, by a preponderance of the evidence, that the conspiracies charged in the successive indictments were separate

---

3 The motions of Pangborne and Pinney were based on their previous conviction in *United States v. W.V. Pangborne & Co., Inc., et al.*, Cr. No. 84-105 (E.D. Pa.), for a conspiracy to rig bids for other electrical construction projects in the Philadelphia area. We respectfully refer the Court to the separate petition of Pangborne and Pinney for a statement of the facts regarding that previous conviction.

and independent. The proof showed instead that a common agreement existed among certain electrical contractors on USS and other projects in Pennsylvania to rig bids whenever they were invited to bid on the same projects. The Court's lengthy opinion thoroughly canvassed the evidence and made the following findings, *inter alia*:

> A "core group, made up of Sargent Electric, Lord Electric, Foley, Ortlip and Fischback [sic] and Moore with its subsidiary Pangborne, conspired together and with different sub groups to eliminate competitive bidding in each location at which members of the conspiracy bid" (50a).[4]
>
> "It is indisputable in this case that the time periods [of the bid rigging at each location] are basically congruent. . . . [I]t is clear that bid rigging was taking place at all facilities for a substantial part of the period between 1971 and 1981" (49a).
>
> "These contractors were competitors in that they were all available and capable of being added to the bid list of each facility. If they were added to the list, they would then be eligible to bid for jobs" (53a).
>
> "The parties' relationships at one facility depended upon their relationships at the others. If they could not work together and agree at one facility, they could not work together anywhere. . . . Although contracts were not allocated among the facilities, contractors cooperated at a facility to protect their position at the other facilities. . . . The companies agreed in one place so that they would be permitted to participate in another" (52a-53a).

---

4 All appendix citations are to the Appendix in the petition of Pangborne and Pinney. "Foley," named in the quotation, is The Howard P. Foley Company, a co-defendant in the Western Works indictment which was not indicted in the present case because of a previous plea agreement with the government. "Ortlip" is the Harry F. Ortlip Company, which was not a defendant in the Western Works indictment.

On these and other carefully-detailed facts, the trial court concluded that

> "there was one general understanding among all the participating electrical contractors which had been in existence for a number of years that bids would be rigged when circumstances permitted regardless of whether the job was at U.S. Steel in Western Pennsylvania, Fairless Hills, Gulf Oil, Arco, Sun Oil or Lukens Steel" (55a).

Thus, because the bid rigging alleged in the present indictment was part of the same overall agreement to rig electrical construction bids for which the defendants had previously been tried, convicted and punished, the District Court dismissed the indictments.

B. ***The Court of Appeals' Decisions***

The Court of Appeals reversed in a 2-1 decision, each member of the majority writing separately and Judge Adams writing in dissent.

1. *Judge Gibbons' Opinion.* Judge Gibbons, announcing the judgment of the Court, held that the District Court committed "fundamental error" by "focusing on the common motive of fixing prices while disregarding the other essential element of a section 1 Sherman Act case, relevant market" (14a). Judge Gibbons neither cited any authority for this proposition nor explained fully how a "relevant market" is to be defined for purposes of per se antitrust violations under Section 1. However, his opinion applied his "relevant market" test to the facts of this case by ruling that a single conspiracy is impossible, as a matter of law, where (1) the contractors must be invited to bid by the customer soliciting bids, and (2) bid lists are not identical at the different facilities involved in the conspiracy.

Judge Gibbons' opinion seems to conclude that, every time an owner prepares a different bid list with different contractors, there is a separate indictable conspiracy in a separate

"relevant market"—even if the contractors are agreed, all along, that those who are invited to bid will rig the bidding.

2. *Judge Stapleton's Concurrence.* Judge Stapleton, concurring separately, employed a different analysis: evidence of the scope of a Section 1 conspiracy must be judged against certain presumptions based upon economic theory. Although Judge Stapleton did not identify the source of this theory, he described it as follows:

> "Experience teaches that one seeking to maximize his risk/benefit ratio will generally prefer to make ad hoc decisions that can take into account the facts of each situation bearing on benefit and risk unless there is some substantial benefit attainable from a broader commitment which is unobtainable through ad hoc decision-making" (16a-17a).

Applying this theory, Judge Stapleton reasoned that, notwithstanding the District Court's finding of a single agreement to rig bids whenever the composition of the bid list permitted, a rational actor would prefer to engage in site-by-site conspiracies. Because the contractors had not provided "unambiguous evidence of an overarching conspiracy" to overcome this presumption, and because the facts found by the District Court were "equally consistent with a finding of multiple conspiracies" (19a), Judge Stapleton held that the second indictment should stand. Furthermore, in evaluating the evidence, Judge Stapleton conducted a virtually *de novo* review of the facts, holding that the District Court's findings were erroneous where they conflicted with the conclusions Judge Stapleton drew from the testimony and other evidence (17a-20a).

3. *Judge Adams' Dissent.* In a vigorous dissent, Judge Adams argued that the majority's opinions had created new and ill-advised standards for double jeopardy claims in conspiracy prosecutions—standards in conflict with long-standing decisions of this Court as well as with the decisions of other

circuits. Judge Adams pointed out that Judge Gibbons' "relevant market" analysis has no place in a case alleging a per se violation of Section 1 of the Sherman Act, where "a demonstration of market power is deemed unnecessary" (25a n.2, *citing, inter alia, United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)). Judge Adams also noted that the standard created by the majority would have far-reaching effects, as it would preclude any finding of a large-scale Section 1 conspiracy whenever even one of the participants was unable to bid at all locations (26a-27a).

Judge Adams also criticized the majority for substituting its own view of the evidence for that of the District Court (33a-34a). In usurping the District Court's role as the finder of fact, Judge Adams wrote, the majority had disregarded this Court's recent admonition that:

> "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."

Anderson v. City of Bessemer City, ____ U.S. ____, 105 S.Ct. 1504, 1512 (1985), *cited at* 34a. Judge Adams further criticized Judge Stapleton's opinion for improperly placing the burden of proof on the defendants by requiring "unambiguous proof of an overarching conspiracy" to permit affirmance of the District Court's decision (19a). Judge Adams urged that the correct standard would require the government to bear the burden of proving separate conspiracies, once defendants had made out a nonfrivolous claim of double jeopardy (34a-35a).

Reasons for Granting the Writ

I. The Court of Appeals' "Relevant Market" Analysis, and Its Creation of Legal Presumptions Based on Speculative Economic Theories, Rewrite the Law on Conspiracies under Section 1 of the Sherman Act.

A. *The Decision Below Is in Conflict with Decisions of This Court*

The Third Circuit's introduction of a "relevant market" element into a per se case under Section 1 of the Sherman Act departs dramatically from this Court's prior decisions. By holding that the single, continuing agreement to rig bids found by the District Court could not establish a single conspiracy, the Court of Appeals has created confusion and uncertainty in a heretofore settled area of the law.

The Court of Appeals' mistake is far-reaching. The very reason for the per se rule is to avoid the necessity of measuring market impact for inherently anti-competitive activities such as price-fixing. As this Court has recently stated,

> "Horizontal price-fixing and output limitations are ordinarily condemned as a matter of law under an "illegal per se" approach because the probability that these practices are anticompetitive is so high . . . . In such circumstances, a restraint is presumed unreasonable *without inquiry into the particular market context in which it is found*."

National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984) (emphasis added). If the Third Circuit's approach is permitted, the purpose of the per se rule will be devoured by prolonged argument over the market impact of alleged anticompetitive activity. The novelty of the Third Circuit's "relevant market" analysis is evident from the fact that not a single authority is cited in support.[5]

---

5 The government did not argue below that the District Court's decision was flawed for failing to define a relevant market.

The Court of Appeals' approach creates a further anomaly. The majority holds that, because the conspirators' ability to rig bids was dependent on their being invited to bid, the bid lists on each project defined the relevant market and therefore the conspiracy (13a). But this is no different from saying that, without the power to assure the success of the conspiracy as to each project, the participants cannot have conspired.

Such a standard, again, rewrites the law of per se unlawful conspiracies, which at least since this Court's decision in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), has rejected any weighing of the probabilities of the success of the conspiracy. "It is the 'contract, combination . . . or conspiracy, in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other." *Id.* at 225 n.59 (*quoting* Section 1 of the Sherman Act). Thus, an antitrust conspiracy may be established although no overt act is shown and although there is no evidence that "the conspirators had the means available for accomplishment of their objective." *Id.*

Similarly, the presumption created by Judge Stapleton's concurring opinion—namely, that conspirators do not engage in single, continuing conspiracies but instead in separate, ad-hoc acts of bid-rigging—replaces traditional analysis of Sherman Act conspiracies with speculative, *a priori* economic theorizing. Judge Stapleton cited no authority, either judicial or academic, for his theory favoring multiple rather than single antitrust conspiracies, and none exists. Moreover, the opinion's reliance on an economic theory describing the behavior of hypothetical rational actors introduces an unwarranted—and unprincipled—complexity into price-fixing cases. The nature of the illegal agreement properly depends upon the facts—not upon the application of "some *a priori* economic model." *Cf. Albrecht v. Herald Co.*, 390 U.S. 145, 152 n.8 (1968).

B. ***The Decision Below Is in Conflict with Decisions of Other Circuits***

Courts of appeals in other circuits have not hesitated to find single, large scale price-fixing conspiracies encompassing widely-scattered locations over lengthy periods, regardless of differences in the details of the price-fixing at different locations. *E.g., United States v. Beachner Construction Co, Inc.*, 729 F.2d 1278 (10th Cir. 1984); *United States v. Portsmouth Paving Corp.*, 694 F.2d 312 (4th Cir. 1982); *United States v. David E. Thompson, Inc.*, 621 F.2d 1147 (1st Cir. 1980); *United States v. Consolidated Packaging Corp.*, 575 F.2d 117 (7th Cir. 1978). Rather than focusing arbitrarily on the single factor of differences in bidders lists at different locations, these cases concentrate on whether a common agreement governed the conspirators' participation in bid-rigging at different times and at different locations, since "[t]he gist of the crime of conspiracy . . . is the agreement." *Braverman v. United States*, 317 U.S. 49, 53 (1942). Indeed, the use of a "relevant market" analysis (per Judge Gibbons) or a factual presumption of ad-hoc decision making (per Judge Stapleton) would have produced entirely different results in each of these cases.

For example, in *United States v. Beachner Const., supra*, the government had divided a 20-year, statewide scheme to rig highway construction projects into two indictments. In response to a double jeopardy claim, the government argued that there were separate conspiracies "[b]ecause each job could be rigged only after individual negotiations at the time of the letting" and "the participating contractors would not usually base their decision to 'go along' with the rigging on the reliance of a future 'favor' from another contractor." 729 F.2d at 1283. Further, the evidence established that, because of conditions in the industry and other factors beyond the control of the participants, the vast majority of all jobs could not be rigged in the later years of the alleged conspiracy. *Id.* at 1280. Nevertheless, the Tenth Circuit found a violation of the Double Jeopardy Clause in the improper division of a single con-

spiracy, as defined by "the common objective . . . shared by each participating contractor: *to eliminate price competition and ensure higher individual profits*." *Id.* at 1283 (emphasis original).

Similarly, in *United States v. David E. Thompson, Inc.*, *supra*, the jury's finding of a single bid-rigging conspiracy was upheld despite the fact that "changes in industry practices" prevented the conspirators from controlling the composition of the bid lists during a substantial portion of the period involved. 621 F.2d at 1149, 1151-52. And in *United States v. Portsmouth Paving Corp.*, *supra*, a single conspiracy finding was sustained even though different groups of bidders bid at different locations and "economic feasibility" would not have permitted one of the bidders to participate at other sites. 694 F.2d at 319.[6]

Accordingly, the Court should grant the writ because the Third Circuit's decision creates new antitrust standards in conflict with this Court's precedents, and to resolve the conflict between the Third Circuit's decision and those of other Circuits.

II. The Narrow "Relevant Market" Test Employed by the Court of Appeals Is in Conflict with the "Totality of the Circumstances" Test Used by Other Circuits to Determine Whether Successive Conspiracy Prosecutions Violate the Double Jeopardy Clause.

This Court has never ruled on whether a "totality of the circumstances" test should be used to evaluate a claim that successive conspiracy prosecutions violate the Double Jeopardy Clause. Nevertheless, almost every circuit has expressly held that such double jeopardy claims must be judged by a "totality of the circumstances" test, rather than by the "same evidence" test traditionally applied to double jeopardy claims under this Court's decision in *Blockburger v. United*

---

6 Similarly, in *United States v. Consolidated Packaging*, *supra*, the Court ruled irrelevant the fact that various conspirators were not invited to bid by certain purchasers. 575 F.2d at 124.

States, 284 U.S. 299, 304 (1932).[7] This approach is the only sensible one, since application of the same-evidence test would permit the government to bring multiple prosecutions for different parts of a single conspiracy simply by alleging different overt acts in each indictment. Furthermore, the "same evidence" test ignores the unique nature of the crime of conspiracy: the scope of a conspiracy is determined by the scope of the agreement among the conspirators, not the separate actions taken pursuant to that agreement. *See generally* cases cited *supra* n.7.

The Third Circuit, however, has refrained from expressly adopting this "totality of the circumstances" test. *United States v. Felton*, 753 F.2d 276, 281 (3d Cir. 1985). Indeed, the Third Circuit panel in this case ignored the District Court's finding that consideration of all the circumstances demonstrated that a common agreement covered all locations. Instead, the Court of Appeals chose to focus on the particular circumstances of bid rigging at the locations named in the different indictments. Such an approach is fundamentally irreconcilable with the "totality of the circumstances" test and almost inevitably leads to a finding of separate conspiracies.

Moreover, the Third Circuit's approach is also fundamentally at odds with the test commonly employed to determine whether evidence in a given trial demonstrates the conspiracy

---

7 *See United States v. Thomas*, 759 F.2d 659, 662 (8th Cir. 1985); *United States v. Beachner Construction*, *supra*; *United States v. Sinito*, 723 F.2d 1250, 1255-57 (6th Cir. 1983), *cert. denied*, ___ U.S. ___, 105 S. Ct. 86 (1984); *United States v. Sturman*, 679 F.2d 840, 843 (11th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *United States v. Booth*, 673 F.2d 27, 29 (1st Cir.), *cert. denied*, 456 U.S. 978 (1982); *United States v. Castro*, 629 F.2d 456 (7th Cir. 1980); *United States v. Marable*, 578 F.2d 151, 153-53 (5th Cir. 1978); *United States v. Mallah*, 503 F.2d 971, 976 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975). *See also United States v. Bendis*, 681 F.2d 561, 564 (9th Cir. 1981), *cert. denied*, 459 U.S. 973 (1982) (applying a "factor analysis").

The Fourth Circuit has expressly reserved decision on whether a "totality of the circumstances" test should be applied in place of the "same evidence" test. *See United States v. Lurz*, 666 F.2d 69, 74 (4th Cir. 1981), *cert. denied*, 459 U.S. 843 (1982).

charged or different conspiracies. When that question is presented, the trier of fact must determine the scope of the agreement or agreements among the defendants by inferences drawn from "all the circumstances and the conduct of all the alleged participants."[8] Indeed, that was the approach employed by the Third Circuit in affirming Lord Electric's conviction for a single conspiracy in the Western Pennsylvania case. *United States v. Fischbach and Moore*, *supra*, 750 F.2d at 1189-90.[9] To use a totality of the circumstances test to define the scope of a conspiracy on direct appeal from a conviction and a different test to define the scope of a conspiracy on a double jeopardy claim violates principles of fundamental fairness.

Accordingly, this Court should grant the writ to determine whether successive conspiracy prosecutions should be judged by a totality of the circumstances test for purposes of the Double Jeopardy Clause.

III. This Court Should Grant the Writ to Determine A Defendant's Procedural Rights on a Pre-trial Claim of Double Jeopardy.

A. *Burden of Proof*

In *Abney v. United States*, 431 U.S. 651 (1977), this Court held that denial of a pre-trial motion to dismiss an indictment on grounds of double jeopardy was immediately appealable under the collateral-order rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). But this Court has never ruled on the procedural standards that should govern the hearing and determination of such a pre-trial motion, an issue on which the Circuits are divided. In the First, Second, Fifth

---

8 *See, e.g.*, Federal Criminal Jury Instructions of the Seventh Circuit, § 5.11, "Conspiracy," at 74 (1980).

9 The Court of Appeals specifically relied upon this Court's decision in *United States v. Socony-Vacuum Oil Co.*, *supra*, for the proposition that a single conspiracy may be found even when the conspirators were unable to rig all of the bids that were allegedly included in the conspiracy. 750 F.2d at 1189.

and Sixth Circuits, when a defendant makes out a non-frivolous claim of double jeopardy, the burden shifts to the government to prove by a preponderance of the evidence that the second indictment charges a different crime. *See United States v. Booth*, *supra*, 673 F.2d at 30-31; *United States v. Mallah*, *supra*, 503 F.2d at 986; *United States v. Stricklin*, 591 F.2d 1112, 1124 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979); *United States v. Sinito*, *supra*, 723 F.2d at 1262-1263. The Seventh and Tenth Circuits, however, have held that the burden of persuasion remains at all times on the defendant. *See United States v. Castro*, *supra*, 629 F.2d at 461; *United States v. Beachner Const.*, *supra*, 729 F.2d at 1283-84 n.10; *United States v. Martinez*, 562 F.2d 633, 638 (10th Cir. 1977).[10]

In this case, Judge Gibbons' opinion acknowledged that the Third Circuit has in the past required the government to bear the burden of persuasion,[11] but nevertheless joined in Judge Stapleton's analysis which found for the government because the *defendants* had not provided "unambiguous evidence of an overarching conspiracy" (14a n.3; 19a). Judge Adams, in dissent, criticized the majority for placing the burden of proof on the defendants (33a-34a). This Court should grant the writ to resolve the split in the circuits on this issue.

B. ***Standard of Review***

The majority's opinions also raise the question whether appellate courts are required to defer to the trial court's findings of fact on whether the government has established that the conspiracy charged in the second indictment is separate from that charged in the earlier indictment. Here, as Judge Adams' dissent points out, the majority frankly ignored the

---

10 The Ninth Circuit has taken still a different position, holding that a defendant's prima facie showing of a double jeopardy violation shifts the burden of coming forward with evidence, but not necessarily the burden of persuasion, to the government. *United States v. Bendis*, *supra*, 681 F.2d at 564.

11 *See United States v. Inmon*, 568 F.2d 326, 332 (3d Cir. 1977).

District Court's findings where they conflicted with the majority's view of the evidence (32a-34a). Judge Adams also pointed out that, since the District Court's findings were based on a lengthy evidentiary hearing at which witnesses testified, the majority's de novo review was in conflict with this Court's recent decision in *Anderson v. City of Bessemer City*, 105 S.Ct. 1504, 1512 (1985), which held:

> "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."

This Court should grant the writ to determine whether the admonition in *Anderson*, *supra*, applies to a district court's findings on a claim of double jeopardy.

Conclusion

For these reasons a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

JAY TOPKIS
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
345 Park Avenue
New York, New York 10154
(Counsel of Record)

JEFFREY C. SLADE
BRENDA WRIGHT
MEISTER LEVENTHAL & SLADE
777 Third Avenue
New York, New York 10017

WILSON M. BROWN, III
DRINKER BIDDLE & REATH
1100 Philadelphia National Bank Building
Broad and Chestnut Streets
Philadelphia, Pennsylvania 19107

Counsel for Petitioner
Lord Electric Company, Inc.